IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LAURA E. CROCKETT,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	
	)	**No. 04-2199-CM**
KEEBLER/SUNSHINE BISCUITS, and LOCAL 184-L BAKERY AND CONFECTIONARY WORKERS UNION	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

On May 7, 2004, plaintiff brought suit against defendant Keebler/Sunshine Biscuits ("Keebler") for harassment based upon sex and race in violation of Title VII (Count I), against Keebler and Local 184-L Bakery and Confectionary Workers Union's ("the Union") for retaliation based upon sex, race, age and physical disability in violation of 42 U.S.C. § 1981 (Count II), against Keebler for sex and race discrimination in violation of 42 U.S.C. § 1981 (Count III), against Keebler for Title VII discrimination based upon violation of the Family and Medical Leave Act of 1993 ("FMLA") (Count IV), against Keebler and the Union for 42 U.S.C. § 1981 discrimination based upon violation of the "Americans Against Disabilities Act," (Count V), and against the Union for breach of the Union's duty of fair representation (Count VI). Pending before the court is Keebler's Motion for Summary Judgment (Doc. 46), the Union's Motion for Summary Judgment (Doc. 47), and the Union's Motion to Strike Certain Exhibits and Facts Submitted in Support of Plaintiff's Brief in Opposition to Defendants' Motions for Summary Judgment (Doc. 61).

I. The Union's Motion to Strike (Doc. 61)

The Union moves the court to strike a long list of plaintiff's facts and exhibits, arguing that they are inadmissible, lack foundation, and/or are unsupported by the record. Plaintiff did not respond to this motion. Pursuant to D. Kan. Rule 7.4, "[i]f a respondent fails to file a response within the time required by Rule 6.1(d), the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." Because the time for response to the Union's motion to strike is long past, the motion is uncontested, and the court hereby grants the Union's motion. The court will not consider any of the exhibits and facts outlined in the Union's motion to strike in making its summary judgment ruling.

II. Keebler Summary Judgment Motion (Doc. 46)

A. Facts

As a preliminary matter, the court notes that plaintiff's response brief fails to adequately respond to, much less properly controvert, Keebler's statement of facts. Plaintiff summarily denies many paragraphs of Keebler's statement of facts without citing to any evidentiary support, and then proceeds to state her own facts. Local Rule 56.1 requires that "[e]ach fact in dispute shall be numbered by paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the number of the movant's fact that is disputed." D. Kan. Rule 56.1(b)(1). Plaintiff has failed to comply with these requirements. Thus, where allegedly disputed facts are not directly controverted by evidence contained in the record, the court considers those facts uncontroverted pursuant to Fed. R. Civ. P. 56. However, the court will deem Keebler's facts controverted to the extent that plaintiff's own facts fairly meet the substance of Keebler's statement of facts and are supported by competent evidence. In addition, the court

considered only those facts which were not encompassed within the Union's unopposed motion to strike, as discussed above.

Plaintiff is an African-American female who was born on April 18, 1957. Plaintiff was hired by Keebler's predecessor in August 1976. She worked as a forklift operator from 1994 until Keebler terminated her employment in April 2003. During the period of her employment with Keebler, plaintiff was a member of and represented by the Union, which is the collective bargaining agent for a bargaining unit of employees in which plaintiff was included.

While employed at Keebler, plaintiff requested and took FMLA leave several times: during 1995 (related to a shoulder injury), September 1997 (related to stress), May 1999 (related to stress, depression, and an ulcer), and twice in August 2002 (related to inflammation). Each time plaintiff requested FMLA leave, Keebler granted plaintiff's request, and plaintiff always returned from FMLA leave to the same job, on the same shift, receiving the same pay and benefits.

It is uncontroverted that sometime during 2000, plaintiff heard her former supervisor, Bill Ellifrits, say that he did not want women or blacks working in the shipping department. In response to that comment, plaintiff told the union steward that Ellifrits was harassing her. Ellifrits has not been plaintiff's supervisor since early 2003.

Keebler disciplined plaintiff in January 2003 after co-workers told Keebler that plaintiff claimed she owned a gun and was not afraid to use it. The co-workers, including both Caucasian and African-American women, wanted their lockers moved away from plaintiff's locker. Plaintiff denies making that specific threat, but admits she asked to buy bullets from one co-worker and told another co-worker that she was going to get a gun because it looked like another co-worker "was going to her pocketbook to pull something out on me."

Keebler has had a policy against workplace violence since August 2000. Plaintiff acknowledges that Keebler has a workplace violence policy and that Keebler warned her in January 2003 that she could be fired for engaging in workplace violence. The Keebler Company Workplace Violence Policy states that "workplace violence" includes, inter alia, (a) causing physical injury to another person, (b) offensive or unwelcome touching of another employee, (c) intimidating or threatening gestures or body posture that reflects possible violence or threat of violence, (d) verbal threats that cause an employee to fear possible harm by another employee, and (e) aggressive or hostile behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress. Keebler's policy also provides that Keebler will investigate complaints of violence thoroughly, and that corrective action may include immediate termination of the employee.

On April 10, 2003, plaintiff was involved in an altercation with a female African-American co-worker named Yvette Thomas. Keebler's human resources manager, Mark LaFond, investigated the incident by meeting with plaintiff, Ms. Thomas, and two witnesses individually. The Union's chief steward, Dwayne Fields, was present for each of these meetings.

According to Mr. LaFond's investigation notes, during plaintiff's interview regarding the April 10, 2003 incident, plaintiff said that after asking a co-worker, Rose Yorkovich, to check a load, Ms. Thomas came running over and said, "Rose, I don't know what the problem is, its been doing that all week." In response, plaintiff got down from her jack and approached Ms. Thomas to ask her why she was so excited. Plaintiff alleges that as she approached, Ms. Thomas started shaking her finger in her face. Plaintiff alleges that Ms. Thomas called her a "bitch" and stated "it's on." Plaintiff stated that she and Ms. Thomas might have touched while they waived their arms at each other, but plaintiff denies that she bumped Ms. Thomas intentionally.

Plaintiff's written statement, which was written shortly after the incident, states that after asking Ms. Yorkovich to help her with the load, Ms. Thomas looked at plaintiff while yelling at Ms. Yorkovich, saying "ain't nothing wrong with this line[,] it ran all day good. Rose you don't have to do nothing. She just want to have you do something." Plaintiff's written statement also asserts that she asked Ms. Yorkovich for help several additional times, then got off the jack and went over to Ms. Thomas "to tell her face to face" about the problem. Plaintiff further stated that Ms. Thomas's reaction became "hostile," and "that is when one thing lead to another." Plaintiff stated that when she could not get Ms. Thomas to understand her, she walked away while Ms. Thomas yelled at her "Bitch its on. Bitch ya ass is out of here. You are out of here. You gone, I got Rose on my side!" Plaintiff is unaware of any witness to her altercation with Ms. Thomas who supports her version of events.

Ms. Thomas' version of the events, as set forth in Mr. LaFond's interview notes, is that plaintiff wanted Ms. Yorkovich to take notice of some product that was not wrapped properly. Ms. Thomas stated that, as she started walking toward plaintiff and Ms. Yorkovich, plaintiff told them "its been doing that all week." Ms. Thomas then said that plaintiff got down from her forklift, approached Ms. Thomas, bumped into Ms. Thomas with her chest, and hit Ms. Thomas between the eyes while yelling at her. Ms. Thomas told Mr. LaFond that she blocked her face with her hands and moved away from plaintiff, but plaintiff followed her and continued hitting her between the eyes with her fingers. Ms. Thomas stated that the altercation ended when Ms. Yorkovich stood between the two to break it up.

In her written statement dated April 16, 2003, Ms. Thomas also wrote that plaintiff and Ms. Thomas made contact with their hands when Ms. Thomas put her arms up in an attempt to block plaintiff's hands away from her face. The written account also states that plaintiff stood in a

"fighting stance" and told Ms. Thomas to "come on." Ms. Thomas also wrote that plaintiff threatened to do "something" to Ms. Thomas if plaintiff was fired as a result of the incident.

Ms. Yorkovich told Mr. LaFond that plaintiff pushed and shoved Ms. Thomas, and poked Ms. Thomas between the eyes during the argument. Ms. Yorkovich told Mr. LaFond she was in disbelief because she could not understand what "tripped plaintiff's trigger" and that after she called security for help, plaintiff said, "I'll get you, too." Ms. Yorkovich's written statement states that she saw plaintiff get down from her forklift, approach Ms. Thomas, bump into Ms. Thomas with her body, and point in Ms. Thomas's face with her finger. The written account also states that the two made contact with their hands when Ms. Thomas put her arms up in an attempt to get plaintiff's hands away from her face. The written account also states that Ms. Yorkovich intervened to break up the fight.

Another witness, Sam Jackson, reported that he saw plaintiff and Ms. Thomas with their hands and arms locked up in what appeared to be a fist fight, but Mr. Jackson did not see how the altercation began.

After Keebler's investigation of the April 10, 2003 incident, plaintiff was suspended from her employment at Keebler pending further investigation. Based upon the prior warning given to plaintiff, and the corroborated witness statements concerning the April 10 incident, Mr. LaFond decided to terminate plaintiff's employment. Keebler confirmed plaintiff's discharge with a termination letter dated April 22, 2003.

Ms. Thomas called Mr. LaFond on April 11, 2003, to report that several employees had approached Ms. Thomas to warn her about plaintiff. Ms. Thomas told Mr. LaFond: "People tell me she carries a gun and has told people she's not afraid to use it."

Plaintiff admits that pushing or threatening another employee would warrant termination of employment. No comments about plaintiff's age, race, or sex were made in conjunction with her termination. Plaintiff's job was filled by an African-American woman who was the most senior bidder under Keebler's collective bargaining agreement process.

Plaintiff identified approximately eight co-workers in her charge documents and deposition testimony who she claims also engaged in workplace violence but were treated better than she was (either not terminated or rehired after termination). All of these co-workers are female and/or African-American. Plaintiff later testified in her deposition that Sue Horton, a white female, received favorable treatment after she allegedly "cursed out a supervisor and she also got caught smoking in the restroom," and was reinstated from termination.[1]

Following her termination from Keebler, plaintiff filed a grievance in accordance with the procedures of the Union's collective bargaining agreement. The Union ultimately determined that it would not arbitrate plaintiff's grievance after concluding that, in light of the evidence, plaintiff's grievance appeared to have no merit. The Union notified plaintiff of its decision to withdraw her grievance by letter dated September 22, 2003. On or around September 24, 2003, plaintiff's attorney at the time requested that the Union Executive Board reconsider the decision to withdraw plaintiff's grievance. By letter dated October 31, 2003, the Union notified plaintiff's attorney that the Union Executive Board had re-examined plaintiff's grievance and decided to uphold its earlier decision not to arbitrate the grievance.

[1] The court notes that plaintiff's summary judgment response simply states that Sue Horton, a white female, participated in workplace violence and was not terminated. It did not give additional details; these came from defendants' facts.

Plaintiff filed a charge of discrimination (charge no. 281-2004-00760) with the Equal Employment Opportunity Commission ("EEOC") on October 30, 2003, claiming she had a disability and experienced difficulty obtaining a work accommodation. She also asserted that Keebler terminated her employment in retaliation for an accommodation request. On November 13, 2003, the EEOC issued its Dismissal and Notice of Rights with respect to Charge No. 281-2004-00760. Plaintiff received the Dismissal and Notice on or about that date.

On February 4, 2004, plaintiff filed a second charge of discrimination (charge no. 281-2004-02778). In that charge, plaintiff claimed that Keebler discriminated against her on the basis of race, color, and sex when it terminated her employment, when it failed to reinstate her, when it conspired to make a false report of assault or stalking "due to my race and age," and conspired to make a false complaint in January 2003 that she had a gun. That charge identified several female African-American co-workers as "comparables" to show that plaintiff was treated less favorably by Keebler. Plaintiff's second EEOC charge also claimed that Keebler denied plaintiff disability accommodations granted to other co-workers and retaliated against her for complaints about working conditions and because she requested accommodation. On February 9, 2004, the EEOC issued its Dismissal with Notice of Rights for plaintiff's second EEOC charge. The EEOC did not issue a right-to-sue notice on plaintiff's disability claims, noting that it had already done so on November 13, 2003. The letter stated that, because the comparables plaintiff identified as having received more favorable treatment were all African-American and were both male and female, there was insufficient evidence for the EEOC to continue its investigation into plaintiff's remaining allegations of discrimination and retaliation. Plaintiff filed her complaint in this case on May 7, 2004.

B. Summary Judgment Standard

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

C. Analysis of Keebler's Motion for Summary Judgment

1. Exhaustion of Administrative Remedies

Keebler asserts that plaintiff failed to exhaust her administrative remedies with regard to her Title VII harassment claims based on race and sex (Count I).[2] The court lacks jurisdiction to entertain a Title VII claim not previously filed with the EEOC. *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997). However, claims that are reasonably related to claims included in the EEOC charge may be asserted. *Harrell v. Spangler*, 957 F. Supp. 1215, 1219 (D. Kan.1997). The purpose of the exhaustion requirement is to provide notice of the alleged violation to the charged party and give the agency information which it needs to investigate and resolve the dispute between the employer and the employee. *Seymore*, 111 F.3d at 799.

Keebler contends that, because neither of plaintiff's two EEOC charges included specific allegations of harassment, plaintiff failed to exhaust her administrative remedies with regard to her Title VII harassment claims. After a careful review of plaintiff's EEOC charges, the court agrees. Plaintiff filed her first EEOC charge on October 30, 2003, alleging retaliation and disability

[2] Keebler refers to these claims as "hostile work environment harassment." Although this is probably a more accurate title for plaintiff's claim, the court will refer to the claim as a harassment claim because plaintiff never uses the term "hostile work environment."

discrimination. Plaintiff filed the October 30 charge by filling out an EEOC Charge of Discrimination form. This form includes a section entitled "Harassment" and asks: "Do you believe that because of your race, color, sex, national origin, religion, pregnancy, age or disability you were subject to conduct that unreasonably interfered with your job performance or created an intimidating, hostile, or offensive work environment?" Plaintiff did not check either the "yes" or "no" box, and left the majority of the remaining boxes and blanks empty. Although not dispositive, plaintiff's failure to check the "yes" box creates a presumption that she did not intend to assert a charge of harassment. *Gunnell v. Utah Valley State Coll.*, 152 F.3d 1253, 1260 (10th Cir. 1998).

This presumption can be overcome if the EEOC charge "'encompass[es] any discrimination like or reasonably related to the allegations of the EEOC charge.'" *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003) (quotation omitted). Here, however, the narrative portion of plaintiff's October 30 EEOC does not mention any sexual or racial harassment, or any allegations that are "like or reasonably related" to harassment.

Plaintiff's second EEOC charge, filed on February 4, 2004, contains more thorough allegations divided between five categories including "discrimination due to race, color and sex," "discrimination due to disability," and "discrimination due to retaliation." However, plaintiff's February 4 charge contains allegations consisting almost entirely of discrimination arising from the discrete April 10, 2003 incident. The court finds that plaintiff's February 4 EEOC charge does not encompass any allegations that could be construed as like or reasonably related to allegations of racial or sexual harassment. *Martinez*, 347 F.3d at 1210.

Furthermore, the court finds that none of plaintiff's allegations of harassment are reasonably related to the incidents mentioned in plaintiff's EEOC charges. The Pretrial Order entered in this case does not mention any specific harassment allegations. Plaintiff's complaint alleges that

plaintiff was harassed for complaining about "improper and dangerous working conditions and equipment and for discriminatory acts of whit [sic] employees against her to due to her race, sex, age and medical condition," that plaintiff was harassed when she complained that a co-worker "used racial [sic] insensitive language when giving her orders to load trailers," and that Keebler conspired with employees to move their lockers close to or away from plaintiff's locker. Keebler notes that plaintiff testified in deposition to being called a "dike" and required to "babysit" two Caucasian co-workers suspected of being intoxicated on the job, but neither plaintiff's complaint nor her response to defendants' motions for summary judgment discuss these allegations. The court finds, however, that none of these allegations are similar to or reasonably related to any allegations contained within her EEOC charges. Thus, plaintiff did not adequately describe a claim of harassment. *See Carter v. Mineta*, 125 Fed Appx. 231, 238 (10th Cir. 2005) (citations omitted); *Gunnel*, 152 F.3d at 1260. Accordingly, plaintiff failed to adequately exhaust plaintiff's administrative remedies with respect to her harassment claim (Count I).

2. Dismissal for Failure to State a Claim

Keebler has pointed out, and the court agrees, that several of plaintiff's claims fail to state a claim upon which relief can be granted. Count II of the Pretrial Order alleges retaliation based upon sex, race, and physical disability, and Count IV alleges FMLA discrimination, both in violation of Title VII. Title VII prohibits discrimination by employers on the basis of race, color, religion, sex or national origin, but it does not address discrimination on the basis of physical disability or the FMLA. 42 U.S.C. § 2000e-2. Therefore, plaintiff's Title VII claims alleging physical disability retaliation (Count II) and FMLA discrimination (Count IV) fail to state a claim upon relief can be granted.

Even if the court were to construe Count IV as a FMLA claim rather than FMLA discrimination under Title VII, plaintiff's claim still fails. Plaintiff's Count IV alleges that plaintiff "was discriminated against by Keebler in failing to provide Plaintiff the provisions provided under the Family and Medical Leave Act of 1993 (FMLA)." (Pretrial Order at 7). The parties list the essential elements of Count IV as follows: "Plaintiff has the burden of proving the following essential elements: (1) Plaintiff was eligible for and entitled to the benefits under the FMLA; (2) Plaintiff was deprived of the benefits she was entitled to under the FMLA." (Pretrial Order at 11). Therefore, although plaintiff's response to Keebler's summary judgment motion with regard to Count IV seems to assert Americans with Disabilities Act ("ADA") discrimination, FMLA leave deprivation and FMLA retaliation, the Pretrial Order is controlling. *See* Fed. R. Civ. P. 16(e); *Wilson v. Muckala*, 303 F.3d 1207, 1215-16 (10th Cir. 2002). Accordingly, the court finds that even if it were to view Count IV as a FMLA claim rather than a Title VII claim, the court will construe Count IV of the Pretrial Order to encompass a claim of FMLA deprivation only.

The record indicates that plaintiff has simply failed to demonstrate that she was deprived of FMLA benefits. As Keebler points out, plaintiff admitted in her deposition that each time she asked for it, plaintiff received all FMLA leave she was entitled to. Moreover, following each FMLA leave, plaintiff was restored to her former job and shift with the same pay and benefits. Thus, even if the court were to construe Count IV as a claim of FMLA deprivation, plaintiff's claim still fails to state a claim for which relief can be granted.

Additionally, Count III alleges discrimination based upon sex and race, and Count V alleges disability discrimination based upon violation of the "Americans Against Disabilities Act," both in violation of 42 U.S.C. § 1981. Section 1981 prohibits discrimination on account of race. *Id.*; *Exum v. United States Olympic Comm.*, 389 F.3d 1130, 1134 (10th Cir. 2004). Accordingly, plaintiff's

claims alleging sex discrimination (Count III) and disability discrimination (Count V) in violation of § 1981 fail to state a claim upon which relief can be granted.

Even if the court were to construe Count V as a discrimination claim under ADA rather than under § 1981, plaintiff's claim is still barred for failure to timely file, as discussed below.

3. Failure to Timely File

Each claim encompassed in plaintiff's October 30, 2003 EEOC charge is barred for failure to timely file.[3] Plaintiff acknowledges that after filing her October 30, 2003 EEOC charge, she received a notice of right to sue letter on November 19, 2003. After receiving this notice, plaintiff had ninety days to file a lawsuit. 42. U.S.C. § 2000e-5(f)(1); *Issa v. Comp USA*, 354 F.3d 1174, 1178 (10th Cir. 2003). Plaintiff filed suit, however, on May 7, 2004—well over ninety days after November 19, 2003. Therefore, plaintiff's retaliation and disability discrimination claims (Counts II and V) are barred as untimely.[4]

4. Plaintiff's Claim of Race Discrimination Pursuant to § 1981

Following dismissal of the aforementioned claims, plaintiff's sole remaining claim against Keebler is race discrimination in violation of § 1981 (Count III).

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[3] The court declines to address Keebler's argument that plaintiff failed to exhaust her administrative remedies with regard to her disability discrimination claims, as the court has already dismissed these claims for failure to state a claim upon which relief can be granted.

[4] Although the ninety-day filing period "'is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling,'" *Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc.*, 702 F.2d 857, 859 (10th Cir. 1989) (quotation omitted), plaintiff's response did not allege any tolling mechanisms.

The court also notes that plaintiff's second EEOC charge, filed February 4, 2004, also alleges retaliation and disability discrimination. However, plaintiff's first EEOC charge is decisive for purposes of exhaustion on those claims; plaintiff cannot simply re-file an identical EEOC charge to to extend her time to bring suit by another ninety days.

In analyzing plaintiff's § 1981 race discrimination claim, the court will apply the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). Under *McDonnell Douglas*, in order to survive summary judgment, plaintiff must first establish a prima facie case of discrimination under § 1981. *Id.* at 802. If plaintiff carries that burden, Keebler must then articulate a facially nondiscriminatory reason for the challenged employment action. *Id.* If Keebler makes such a showing, the burden reverts to plaintiff to prove the proffered nondiscriminatory reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993).

Keebler admits that plaintiff meets the prima facie burden of a § 1981 claim. Keebler's burden, therefore, is to demonstrate a nondiscriminatory reason for terminating plaintiff. Keebler contends that plaintiff was discharged under Keebler's policy against workplace violence, which has been in place since August 2000. The record shows that, on April 11, 2003, Mark LaFond, Keebler's human resources manager, wrote a thorough investigation report regarding the April 10, 2003 incident between plaintiff and Ms. Thomas which allegedly escalated to a physical fight. The report contains plaintiff's history with Keebler, Mr. LaFond's notes from interviews with Ms. Thomas, plaintiff, and two witnesses, as well as a chronology of the events subsequent to the incident at issue. Additionally, the report contains hand-written statements from plaintiff, Ms. Thomas and Ms. Yorkovich, a witness.

As the facts section of this Order reflects, plaintiff's version of the April 10, 2003 incident differs slightly from Ms. Thomas' version. Notably, Ms. Yorkovich's account of the events substantially matches Ms. Thomas' version. Mr. LaFond's report also mentions two other incidents involving plaintiff and possible previous workplace violence. First, Keebler's human resources department received reports from several employees in January 2002 who complained plaintiff

would often talk about owning guns and that "people better watch out." Second, Ms. Thomas called Mr. LaFond on April 11, 2003, the day after the incident at issue, to report that several employees had approached Ms. Thomas to warn her about plaintiff. Ms. Thomas told Mr. LaFond: "People tell me she carries a gun and has told people she's not afraid to use it."

The court finds that Keebler's thorough investigation report demonstrates a nondiscriminatory reason for terminating plaintiff, namely plaintiff's participation in workplace violence and/or threats of violence. Finding that Keebler has met its "'exceedingly light'" burden, *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1279 (10th Cir. 1999) (quotation omitted), the burden shifts to plaintiff to offer evidence "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Randle v. City of Aurora*, 69 F.3d 441, 451-52 (10th Cir. 1995).

The court finds that plaintiff has failed to demonstrate that Keebler's proffered reason for terminating plaintiff's employment is pretext. As an initial matter, plaintiff's response to Keebler's summary judgment motion makes no attempt to make any pretext-specific arguments. Nonetheless, even considering plaintiff's complaint and viewing the evidence in the light most favorable to plaintiff, the court finds that plaintiff's minimal evidence of pretext is unconvincing. Plaintiff's only arguments that can be construed as evidence of pretext are that: (1) "Plaintiff was discriminated against due to her race because Keebler and the Union intentionally and constantly did things to her because of her having had disability training in high school;" (2) "Other similarly situated white male, white female and younger employees (under [sic] 40) outside her class were not terminated;" and (3) "Plaintiff was exonerated of workplace violence by the Administrative Law Judge in her employment hearing." (Doc. 55 at 22).

Plaintiff's first pretext argument is an extremely broad allegation which seems to attribute race discrimination to disability discrimination. Plaintiff's entire allegation is encompassed in this single sentence; plaintiff makes no attempt to elaborate or give additional details or proper record support. Even if the court was able to locate the two exhibits plaintiff cites in support of this statement, the court reiterates that those exhibits are unauthenticated.[5] The court finds that this assertion alone is insufficient to establish pretext.

The relevant part of plaintiff's second pretext argument is that Keebler treated plaintiff differently than other similarly situated white employees. Plaintiff, however, offers no evidence in support of this notion. In fact, plaintiff's facts list only one white employee, Sue Horton, who plaintiff claims participated in workplace violence but was not terminated. Plaintiff did not elaborate, however, on when and how Ms. Horton participated in workplace violence, whether Ms. Horton's alleged incident was comparable to plaintiff's, whether plaintiff and Ms. Horton shared the same supervisor, or whether Keebler's workplace violence policy was in place at the time of Ms. Horton's alleged incident.[6] As such, the court finds this allegation of unequal treatment insufficient to establish pretext.

The court believes plaintiff's third argument addresses an administrative agency's decision to grant plaintiff unemployment benefits. Plaintiff again fails to properly substantiate this allegation or

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[5] *See* the court's ruling on the Union's Motion to Strike and the court's discussion of the plaintiff's facts.

[6] In fact, the only information regarding discipline involving Ms. Horton came from a citation to plaintiff's deposition by *Keebler*, where plaintiff stated that Ms. Horton received favorable treatment after she allegedly "cursed out a supervisor and she also got caught smoking in the restroom," and was reinstated from termination. Even considering plaintiff's unsupported and self-serving statements, plaintiff fails to establish pretext.

provide record support. More importantly, however, this decision does not create a genuine issue of material fact regarding pretext because it is not binding upon this court.

Even if plaintiff demonstrated that defendant's proffered reason for her suspension and termination was unreasonable or unfair, which she has not, that fact alone is not adequate to establish pretext. *See Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994) (stating that when plaintiff's burden is to prove pretext, "[m]erely showing that the reason articulated by the employer is wrong or unreasonable will not suffice"). In sum, plaintiff has failed to establish that defendant's motive in suspending and terminating her was discriminatory. Accordingly, summary judgment is warranted on plaintiff's § 1981 race discrimination claim.

III. The Union's Motion for Summary Judgment (Doc. 47)

Plaintiff brought three claims against the Union: (1) harassment based upon sex and race under Title VII (Count II); (2) ADA discrimination under § 1981 (Count V); (3) and breach of the Union's duty of fair representation (Count VI). Counts II and V have already been dismissed by the court, as discussed above. Thus, plaintiff's only remaining claim against the Union is breach of the duty of fair representation. In that claim, plaintiff alleges:

> Plaintiff was discriminated against by the Union when it did not act responsibly on Plaintiff's behalf when she was terminated and on numerous occasions prior to her termination. [The Union] did not investigate her situation, call witnesses on her behalf or provide any written documentation to her as to what services were provided to her in the resolution of her grievances. In fact, in her termination proceedings, the Union basically rubber-stamped Keebler's actions in the matter.

(Pretrial Order at 7).

The Pretrial Order entered in this case states that the parties agree that to prevail on her breach of duty of fair representation claim, plaintiff must prove that (1) plaintiff's discharge was contrary to the collective bargaining agreement between Keebler and the Union, and (2) the Union

breached its duty of representing plaintiff by acting arbitrarily or in bad faith. (Pretrial Order at 11). Therefore, plaintiff's claim fits squarely within the definition of a "hybrid" suit.

A "hybrid" suit, as defined in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983), is so named because it "combines two conceptually independent causes of action, the first against the company for breach of the contract (a standard § 301 claim) and the second against the union for breach of the duty of fair representation (a claim implied by operation of a union's status under federal law as the sole bargaining representative of the employee)." *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1238 (10th Cir. 1998). In addition,

> [t]o prevail against his former employer under this hybrid § 301/DFR [duty of fair representation] cause of action, a discharged worker must prove three elements: (1) Some conduct by the worker's union that breached the duty of fair representation; (2) A causal connection showing that the union's breach affected the integrity of the arbitration process, and; (3) A violation of the collective bargaining agreement by the company.

Id. at 1239.

Section 301 of the Labor Management Relations Act ("LMRA") makes collective bargaining agreements enforceable in federal court. *See* 29 U.S.C. § 185. However, the statute does not set forth a statute of limitations. In *DelCostello*, the United States Supreme Court determined that "federal labor policies and the practicalities of § 301 litigation supported the application of the six-month statute of limitations prescribed by § 10(b) of the LMRA, 29 U.S.C. § 160(b), to 'hybrid' § 301/unfair representation suits charging an employer breached a collective-bargaining agreement and the union breached its duty of fair representation." *Edwards v. Int'l Union, United Plant Guard Workers*, 46 F.3d 1047, 1050 (10th Cir. 1995) (citing *DelCostello*, 462 U.S. at 154-55). On several occasions, the Tenth Circuit has followed *DelCostello* and applied a six-month statute of limitations to "hybrid" suits. *See Edwards*, 46 F.3d at 1052; *Aguinaga v. United Food & Commercial Workers*

Int'l Union, 993 F.2d 1463, 1472 (10th Cir. 1993); *Lucas v. Mountain States Tel. & Tel.*, 909 F.2d 419, 420 (10th Cir. 1990); *Rucker v. St. Louis S.W. Ry. Co.*, 917 F.2d 1233, 1237-38 (10th Cir. 1990). The six-month statute of limitations begins running "when the employee 'knows or in the exercise of reasonable diligence should have known or discovered the acts constituting the union's alleged violations.'" *Edwards*, 46 F.3d at 1053 (quoting *Lucas*, 909 F.2d at 420-21).

Here, the Union contends that plaintiff failed to file her claim within the LMRA's statute of limitations. Specifically, the Union submitted notice of its withdrawal of plaintiff's termination grievance by letter dated September 22, 2003. After plaintiff requested reconsideration, the Union again notified plaintiff of its decision to withdraw by letter dated October 31, 2003. It is undisputed that plaintiff filed the instant lawsuit on May 7, 2004. However, even in its response to the Union's summary judgment motion, plaintiff did not mention or provide any information regarding when she actually received the October 31, 2003 letter.

"When the actual receipt date of the [notice of withdrawal letter] is unknown or in dispute, the Tenth Circuit applies a presumption that plaintiff received her [] notice within three days of its mailing." *Bergman v. Sprint/United Mgmt. Co.*, 981 F. Supp. 1399, 1402 (D. Kan. 1997) (citing *Jarrett v. U.S. Sprint Commc'ns Co.*, 22 F.3d 256, 259 (10th Cir. 1994); *Palmer v. Sprint/United Midwest Mgmt. Servs. Co., et al.*, 1997 WL 383065 (D. Kan. June 18, 1997)); *see also Witt v. Roadway Exp.*, 136 F.3d 1424, 1429-30 (10th Cir. 1998) (upholding a rebuttable presumption that a properly addressed EEOC right-to-sue letter placed in the care of the postal service will be received by the recipient); *Stambaugh v. Kan. Dep't of Corr.*, 844 F. Supp. 1431, 1432-34 (D. Kan. 1994) (holding that the receipt presumption is triggered after mailing and when the actual receipt date is either unknown or in dispute). Although the previously-cited cases focus on EEOC notices, the receipt rules applies to union notices of withdrawals. *See Lucas*, 909 F.2d 419 at (finding that in

"hybrid" claims such as this, "the six-month limitation period begins to run when the employee knows or, through the exercise of reasonable diligence, should have known of that union's decision or action").

Plaintiff had ample opportunity to either assert or dispute the date she received the Union's letter, but she chose not to address the issue. The court translates plaintiff's silence to mean that the receipt date is not disputed. *Stambaugh*, 844 F. Supp. at 1434. Therefore, the court finds no basis for applying the three-day presumption. *Id.* As such, plaintiff's "hybrid" claim is barred by the statute of limitations, and the Union's motion for summary judgment is granted on this claim.[7]

IT IS THEREFORE ORDERED that Keebler's Motion for Summary Judgment (Doc. 46), the Union's Motion for Summary Judgment (Doc. 47), and the Union's Motion to Strike Certain Exhibits and Facts Submitted in Support of Plaintiff's Brief in Opposition to Defendants' Motions for Summary Judgment (Doc. 61) are granted. The case is hereby dismissed.

Dated this 27th day of March 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

[7] Even if plaintiff had asserted that the receipt date is unknown, plaintiff's claim would still be barred by the statute of limitations because three days after October 31, 2003 is November 3, 2003, but plaintiff did not file the instant lawsuit until May 7, 2004.